SAULT STE. MARIE CHIPPEWA TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS

DJ HOFFMAN,
Appellant,

-vs-

Case No. APP 2022-05
Lower Court Case No. GCV-2022-03

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS BOARD OF DIRECTORS,
AUSTIN LOWES, Vice-Chairperson
BETTY FREHEIT, Director
ISAAC MCKECHNIE, Director
ROBERT MCRORIE, Director
KIMBERLY HAMPTON, Secretary
DARCY MORROW, Director
MICHAEL MCKERCHIE, Director
TYLER LAPLAUNT, Treasurer
LANA CAUSLEY-SMITH, Director
KIMBERLY LEE, Director
SHAWN BOROWICZ, Director an
BRIDGET SORENSON, Director,
Appellees.

BEFORE: BIRON, CORBIERE, DIETZ, JUMP and FELEPPA, Appellate Judges.

OPINION & ORDER

BIRON, Chief Appellate Judge, who is joined by Corbiere, Dietz, and Feleppa. Jump concurring.

After expedited briefing, this Court heard oral arguments in this matter on November 22, 2022. As set forth below, this Court affirms the November 4, 2022, Order Granting Appellee's Motion to Dismiss.

FACTS AND PROCEDURAL HISTORY

The Sault Ste Marie Tribe of Chippewa Indians Notice of Election was issued on January 28, 2022. (November 4, 2022, Opinion & Order Granting Motion to Dismiss "Tribal Court Opinion", pg.1-2). On May 10, 2022, amongst the backdrop of the 2022 Tribal Election, Dr. Aaron Payment ("Chairperson Payment") resigned as the elected Chairperson of the Sault Ste. Marie Tribe of Chippewa Indians with two years remaining in his term. (*Id.*, pg.1-2). On June 27, 2022, the Board of Directors filled the seat vacated by Chairperson Payment, appointing DJ Hoffman ("Appellant") as Chairperson pursuant to Article VI, Section 2 of the Sault Ste. Marie Tribe of Chippewa Indians Constitution and Bylaws ("Constitution") and the Tribe's Election Ordinance, Chapter 10, Section 10.204(3) which prohibited a Special Advisory Election "after the posting of a Notice of Election for a general election." (*Id,* pg.2.). On July 1, 2022, the Appellant accepted the appointment and took the Tribal Oath of Office. (*Id.*). On July 5, 2022, following the Tribal General Election, the 2022 Sault Ste. Marie Tribe of Chippewa Indians Board of Directors ("2022 Board") took office. (*Id.*). On July 12, 2022, the 2022 Board adopted Resolution 2022-201, entitled "Vote of No Confidence in DJ Hoffman serving as Chairperson of the Sault Ste. Marie Tribe of Chippewa Indians and Suspending Duties Effective Immediately Until Further Notice". (November 15, 2022 Appellant's Brief ("Appellant's Brief", Exhibit M). Despite the Resolution 2022-201, the Appellant "was present and attended all Board meetings." (*Id.* at 6). On August 30, 2022, the 2022 Board amended the Tribe's Election Ordinance, in relevant part, as follows:

- Section 10.201 deleting the sentence "The results of any Special Advisory Election conducted pursuant to this Subchapter are advisory only and are not binding on the Board of Directors."
- Section 10.204(1) revised to read "A Special Advisory Election shall occur no later than ninety (90) days following the vacancy which caused the need for the Special Election."
- Section 10.204 (2) and (3) deleted in their entirety.
- Section 10.208 revised to read "Following the certification of election results by the Election Committee, the Board [o]f Directors shall appoint the individual who received the most votes in the Special Advisory Election."

On September 13, 2022, after conducting a duly called and noticed Special Meeting, it appears that both by Motion and by Resolution, the 2022 Board declared "that the June 27 appointment of the [Appellant] 'did not follow the Code or the Constitution' and further declared the 'appointment to be invalid and…the chair seat vacant."' (Tribal Court Opinion, pg. 2; *See also* Appellant's Brief, pg. 6 and Exhibit N). At the September 13, 2022 Special Meeting, the 2022 Board:

> [M]et to resolve a legal dispute: did Chapter 10, Subchapter 2 require a special advisory election as a prerequisite to filling the vacant position of Chairperson when the general election for Chairperson was still two years away.
>
> The Board considered two interpretations of Chapter 10, subchapter 2. The Election Ordinance at the time the vacancy arose provided that a special election was a condition prerequisite to filling a vacancy on the Board or in the Chair, but it

contained an exception: a special election was not needed if a notice of general election had already been posted.

Section 10.201 [as amended on August 30, 2022] states the general purpose of that subchapter:

> The Board of Directors has determined to conduct Special Advisory Elections to assist it in performing its responsibilities under Article VI. The purpose of this Subchapter is to establish procedures for conducting Special Advisory Elections. The regulations and procedures contained in this Chapter shall be administered in such a way as to accomplish this purpose and intent.

Consistent with that general purpose, the majority of the Board held that the exception only applied if the vacant position had been noticed for the general election—in that situation, the Board could fill the vacancy for the short period of time until the scheduled election was completed. But where, as here, the general election for Chairperson was still two years away, the statute required a special election. The Board therefore concluded that because the special election was a condition precedent to filling the position, Hoffman had not been lawfully installed as Chairman. (citations omitted).

(*November 20, 2022 Appellee's Response Brief*, pg. 2-3)

On September 19, 2022, in accordance with the 2022 Board's September 13 decision, and the Election Ordinance, as amended, a Special Advisory Election was noticed by the Election Committee. (Tribal Court Opinion, pg. 2; Appellant's Brief, Exhibit B.).

On September 22, 2022, the Appellant filed a *Verified Complaint for Injunctive Relief and Plaintiff's Verified Ex Parte Motion for Temporary Restraining Order, Order to Show Cause, Preliminary Injunction, and Brief in Support* against the 2022 Board and each Board member sitting in their individual capacity. (Tribal Court Opinion, pg. 2). On September 23, 2022, the Tribal Court denied the *Appellant's Ex Parte Motion for Temporary Restraining Order, Order to Show Cause* and ordered the *Appellant's Verified Complaint for Injunctive Relief* to be served on the Appellees, set forth an expedited briefing schedule and set the request for preliminary injunction to be heard on October 7, 2022. (September 23, 2022, *Order Denying Ex Parte Motion for Temporary Restraining Order and Notice of Hearing on Motion for Preliminary Injunction*). On September 26, 2022, a Summons was issued by the Court for each named party and Proof of Service were filed with the Court. (*See* Summons for 2022 Board, Austin Lowes et al.).

On October 7, 2022, the 2022 Board and the individually named directors filed a Motion to Dismiss the complaint in its entirety asserting that the 2022 Board and the individually named directors were cloaked by the Tribe's sovereign immunity and that the Tribal Court lacked jurisdiction over the claims in the complaint. (Tribal Court Opinion, pg. 2-3). The Tribal Court heard oral arguments following briefing on the Appellant's surviving motion for preliminary injunction and Appellee's Motion to dismiss. On November 4, 2022, the Tribal Court issued its November 4, 2022 Opinion &

Order Granting Motion to Dismiss. On November 8, 2022, the Appellant filed his Notice of Appeal, Appellant's Motion for Preemptory Reversal and Immediate Consideration of Appeal of the Tribal Court's Opinion and Order Granting [Appellee's] Motion to Dismiss, Brief in Support, and Proof of Service. On November 10, 2022, this Court issued an Order denying the Appellant's Motion for Preemptory Reversal; Granting the Appellant's Motion for immediate consideration and issued an Expedited Briefing Schedule. Both parties were represented by counsel, both parties filed a brief with this Court and both party's counsel were present for the November 22, 2022, oral argument.

JURISDICTION & STANDARD OF REVIEW

Jurisdiction is a threshold matter that must be determined before proceeding to the merits of any case.

Chapter 82 "establishe[s] the procedures by which appeals are taken . . . ." Tribal Code Section 82.101. Tribal Code Section 82.109 sets forth that this Court possesses exclusive jurisdiction to review the decisions of the Tribal Court. Pursuant to Tribal Code Section 82.111, an appeal is properly before this Court if it is an appeal from a final decision of the Tribal Court. Neither party appears to allege that the tribal court made a factual error. The issues before this Court are strictly issues of law, and as such are reviewed *de novo*. STC § 82.124(5). "A matter which is within the discretion of the Tribal Court shall be sustained if it is reflected in the record that the Tribal Court exercised its discretionary authority; applied the appropriate legal standard to the facts; and did not abuse its discretion." *In the Matter of JK*, APP-06-02, p.5 (January 9, 2009). A matter committed to the discretion of the Tribal Court shall not be subject to the judgment of the Court of Appeals. STC § 82.124 (8).

Our Anishinaabe teachings of *nibwaakaawin* (wisdom-use of good sense), *zaagi'idiwin* (practice absolute kindness), *minadendmowin*, (respect – act without harm) as well as *ayaangwaamizi* (careful and cautious consideration) must guide this Court's decision-making. (*Payment v. The Election Committee of the Sault Ste Marie Tribe of Chippewa Indians*, APP-2022-02, December 5, 2022).

DISCUSSION

On September 7, 2022, the Sault Ste. Marie Tribe of Chippewa Indians celebrated fifty (50) years as a sovereign who enjoys a government-to-government relationship with the United States. (*Win Awenen Nisitotung*, Volume 43 No. 9 (Sept. 21, 2022); *See also* 87 CFR 4639). While still a young government in terms of western society, since time immemorial we have been living and governing ourselves in harmony, staying in balance with all of creation, otherwise known to the Anishinaabe as *mino-bimaadiziwin*. (*Payment*, APP-2022-02, December 5, 2022). It would appear to this Court that balance and harmony has been disrupted and strong feelings have developed on both sides. While many who have not taken the time, like the Appellant's counsel, to understand our Tribal culture, values, and systems of government[1] and will instead attempt to overlay western systems and notions of justice to seek a resolution, this Court, like the Tribal Court, is confined by its jurisdictional boundaries

[1] The decisions and opinions of tribal courts "need to contain both compelling legal analysis and cultural referents to demonstrate that the decisions comport with both applicable law and cultural standards." Frank Pommersheim, Tribal Court Jurisprudence: A Snapshot from the Field, 21 VT. L. REV.7, 8–16 (1996).

found not within the Constitution and Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians, but in Tribal Code legislated by the Board of Directors. Because this is the state of both the government and the law, restoration of community balance and harmony is not available through this Court and must be sought through the governing body of the Tribe – the Board of Directors.

Sovereignty at its core – is the right to create your own laws and be governed by them. (*Williams v. Lee*, 358 U.S. 217, 220-21 (1959)("[e]very Indian Nation is free to adopt its own laws and be ruled by them")). "[T]he vestige of 'sovereignty' that the tribe retains and exercises through its Tribal Council and Tribal Courts may call for [the] application of [different principles]." (*Colliflower v. Garland*, 342 F.2d 369 (9th Cir., 1965)). Amid that backdrop, a decade later, on October 9, 1975, the Constitution and Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians ("Constitution") was adopted by the tribal membership and subsequently approved by the Acting Deputy Commissioner of Indian Affairs on November 13, 1975. (Tribal Court Opinion, pg. 3). Since 1975, pursuant to its delineated powers under Article VII of the Constitution, the Sault Tribe Board of Directors has enacted a robust body of law "governing the conduct of persons within the jurisdiction of the tribe".[2] The Sault Tribe Constitution, as adopted, does not create three equal branches of government like the one we learn about in 11th grade U.S. History Class.[3] To be sure, the Tribe's current constitutional governmental framework only calls for the establishment of "a reservation court" and for the Board of Directors to define such courts "duties and powers." (*See* Constitution, *generally* special emphasis on Article VII, Section 1(g)). Thus, under our Tribe's current Constitutional framework, unless specified in the "duties and powers" conferred upon the Tribal Judiciary (the whole of the Tribal Court and Court of Appeals) the legislative, executive, and in some cases, judicial functions involving dispute resolution, begins and ends with the Board of Directors.

As directed by the Tribe's Constitution, the Board of Directors established the Tribe's "reservation court", in relevant part, by enacting Sault Tribe Code, Chapters 80, 81 and 82. Chapter 80 established the Tribal Court – its purpose, authority, structure, jurisdiction and contempt authority.[4,5] Chapter 82 established the Court of Appeals - its purpose, structure, jurisdiction, scope, basic procedure, and standard of review.

Chapter 81 defines and limits the civil jurisdiction of the Tribal Court. Section 81.103 provides:

The Tribal Court shall have jurisdiction of actions:

---

[2] See https://www.saulttribe.com/government/tribal-code.

[3] This Court renders no opinion regarding the Tribe's current form of government. As noted by the Tribal Court in its November 4, 2022 Opinion and Order at pg. 4, many tribes' constitutions expressly create co-equal branches of government in which decisions of each branch are subject to the review authority of each other in certain circumstances. (citations omitted). The Sault Tribe is in the minority, and unlike a court of general jurisdiction that would possess the power to review the decisions of other branches of government, this Court must look to Tribal law to determine the bounds of its jurisdictional authority.

[4] The Tribal Court was first established in 1977 by Board Resolution 5/11/77.

[5] The Tribal Code currently provides the Tribal Court with jurisdiction to hear the following types of cases: criminal, child welfare, juvenile delinquency, landlord-tenant disputes, guardianship matters, civil garnishments, adoptions, conservation matters, torts, workers compensation matters, traffic cases, civil infractions, enforcement of foreign court judgments, civil contempt matters, emancipation, general civil matters and personal protection matters.

(1) Except as otherwise provided by federal law and unless waived in accordance with Tribal Code Chapter 44, where the defendant is:

(a) The Sault Ste. Marie Tribe of Chippewa Indians.
(b) A Tribal entity as defined in Tribal Code Chapter 85.
(c) An officer or employee as defined in Tribal Code Chapter 85 and the action arises from a Tribal function as defined in Tribal Code Chapter 85.

(2) Where the Tribe or a Tribal entity claims an interest in any real or personal property located on Tribal lands which is the subject of the action.

(3) Where the Plaintiff is the Tribe or Tribal entity.

(4) As provided in any other chapter of the Tribal Code.

(5) Where the transaction or occurrence giving rise to the cause of action arose or occurred within the Tribal lands; and

(a) The defendant is a tribal member, a tribal member owned business, or an Indian or business owned by an Indian.
(b) The defendant does business upon Tribal land with the Tribe, a tribal member, or 81-4 a tribal member owned business.
(c) The property involved in the action is located on Tribal land. that the Tribal Court has jurisdiction:

Appellees argue that sovereign immunity protects them from this suit and that this Court is without authority to review a "political" question decided by the Board of Directors. (*Appellee's Brief* at 5). In doing so, Appellees assert that neither Congress nor the Tribe have waived the Tribe's sovereign immunity as it relates to the claims in the Appellant's complaint and that the Appellant has failed to plead a basis for this Court's jurisdiction. (*Id.* at 6.). The Appellee further argues that this Court does not possess jurisdiction to hear this matter and that disputes between the Tribe and its members are to be resolved outside of the judicial system unless the Tribe expressly and unequivocally consents to judicial resolution of the dispute. (*Id.* at 10-11).

The Appellant counters the Appellee's arguments asserting that Article VIII of the Tribe's Constitution confers subject matter jurisdiction to this Court and waives the Tribe's sovereign immunity. (*Appellant's Brief*, p. 9). Appellant argues further that the lower court erred in holding the Indian Civil Rights Act does not waive the Tribe's sovereign immunity. (*Id.* at 11.). Finally, Appellant reiterates his request for preliminary injunction to enjoin the December 7, 2022 Special Advisory Election, or in the alternative, asks this Court to remand the matter to the Tribal Court so it may provide the injunctive relief requested. *(Id.* at 14-17.).

Whether a tribe has waived its sovereign immunity is a jurisdictional question which speaks to a court's authority to hear a case. This authority determination must be made regardless of case merits. **The particular facts do not matter**. (*See Puyallup Tribe v. Department of Game State of Washington*,

433 U.S. 165, 172-73 (1974); *Hagen v. Sisseton Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000); and *Pan American v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989)).

While the Constitution and Bylaws of the Sault Ste Marie Tribe of Chippewa Indians does not reference sovereign immunity within its four corners, tribal sovereign immunity is a long-standing cornerstone of tribal self-governance and self-determination. To be sure, tribal sovereign immunity is a necessary corollary to Indian sovereignty and self-governance. (*Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, APP-16-01, pg. 4, decided July 14, 2016, quotations omitted). "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." (*Okla Tax Comm v Citizen Band of Potawatomi Indian Tribe*, 498 US 505, 509; 111 S Ct 905; 112 L Ed 2d 1112 (1991); citing *Cherokee Nation v. Georgia*, 30 US 1, 13; 8 L Ed 25 (1831)). Tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by other sovereign powers. (Slip op, p 1 (dissent), relying on *Santa Clara Pueblo v Martinez*, 436 US 49, 58; 98 S Ct 1670; 56 L Ed 2d 106 (1978); see also *Turner v US*, 248 US 354, 358; 39 S Ct 109; 63 L Ed 291 (1919); *US v US Fidelity & Guaranty Co*, 309 US 506, 512-13; 60 S Ct 653; 84 L Ed 894 (1940); *Puyallup Tribe, Inc v Wash Dep't of Game,* 433 US 165, 172-73; 97 S Ct 2616; 53 L Ed 2d 667 (1977)). This characteristic of tribal sovereignty is subject only to the superior and plenary control of Congress. (*US Fidelity*, 309 US at 512.). Thus, suits against Indian tribes are barred absent congressional abrogation or a clear waiver of sovereign immunity by the tribe. (*Santa Clara Pueblo,* 436 US at 58.)

It is well settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed.'" (*US v Testan*, 424 US 392, 399; 96 S Ct 948; 47 L Ed 2d 114 (1976); quoting, *US v King*, 395 US 1, 4; 89 S Ct 1501; 23 L Ed 2d 52 (1969)). Specifically pertaining to tribal immunity, the United States Supreme Court has held that immunity is a "core aspect" of sovereignty and necessary to "Indian sovereignty and self -governance." (Slip op, p 1 relying on *Kiowa Tribe of Okla v Mfg Technologies*, 523 US 751, 756; 118 S Ct 1700; 140 L Ed 2d 981 (1998); see also *Michigan v Bay Mills Indian Community*, 572 US 782; 132 S Ct 2024, 2030 (2014); *Santa Clara Pueblo*, 436 US at 58.). Immunity is so important to tribal self-governance that it can only be waived expressly and unequivocally. (*Id.).* "*Santa Clara Pueblo* firmly instructs that sovereign immunity cannot be waived by implication." (Slip op, p 3 (dissent)). "[E]quitable doctrines and judge-made rules…may not be employed to abrogate a sovereign's prerogative to determine how it will express a waiver of its immunity, as that power resides solely with the sovereign." (Slip op, p 3 (dissent)). Tribal sovereign immunity applies both to claims for damages, as well as claims for injunctive and declaratory relief. (*Id.* at pg. 5, citing *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

The Tribe strictly controls immunity waivers through language in Chapter 44 of the Sault Tribe Code and references thereto. (*Macleod v. Sault Ste. Marie Tribe of Chippewa Indians et al.*, APP-21-01, December 5, 2022; *See* Sault Tribe Code, Chapter 44 and Chapter 81.). Despite the inherent sovereign immunity discussed *supra*, the Tribe's choice to enact legislation setting forth how its immunity can be waived reinforces its importance to the Tribe and its self-governance. While other tribal governments' constitutions or laws provide for judicial review of alleged constitutional violations, our Tribe's Constitution is silent. This silence, coupled with the construction of the

"reservation court" by ordinance as set forth in Article VII(g) of the Tribe's Constitution, reinforces the notion that "[u]nlike state, federal or some other tribal courts who are constitutionally separate from their legislative and executive branches, [jurisdiction of the Sault] Tribe's Court must be granted via legislative action." (*Id.*). Indeed, in all areas in which the Sault Tribe Code allows for Tribal Court jurisdiction the Tribe has declared "the jurisdiction to be in the best interests of the Tribe and its members. Such waiver does not infringe upon tribal sovereignty, but instead is an affirmative expression and exercise of such sovereignty." (Sault Tribe Code, Ch. 44, Section 44.102(6)). Chapter 44, Section 44.105 (a) of the Sault Tribe Code sets forth that the sovereign immunity of the Tribe may be waived (in relevant part):

> (a) by resolution of the Board of Directors expressly waiving the sovereign immunity of the Tribe and consenting to suit against the Tribe in any forum designated in the resolution; provided, that such waiver shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds of the Tribe subject to the waiver, court having jurisdiction and applicable law. Such waiver shall be strictly construed and shall be effective only to the extent expressly provided and shall be subject to any conditions or limitations set forth in the resolution…

Furthermore, civil jurisdiction of the Sault Ste Marie Tribal Court pursuant to Chapter 81 is limited to only those cases including a waiver of sovereign immunity meeting the requirements of Chapter 44, Section 44.105(a) when the suit is brought against the Tribe or a Tribal official, as is the case here. The Appellant has failed to produce such a waiver nor, according to record before this Court, can he.

The difficulty of this case, after review of the record, regardless of intentions, is that Appellant **may** have been treated unfairly under certain western principles of justice. There are indications that was the case. However, they are **only indications** as the facts have not and cannot be established. It is true, application of the law of sovereign immunity as stated above will deny Appellant the opportunity to be heard and to make his arguments before a Court.[6] And some would say, the decision is the correct one based on cultural and traditional practices of governance, *gaa-ezhi-ogimaawaadizid* – to act in a way that recognizes those I am responsible for.[7]

In the Anishinaabe's traditional governance structure, tribal customs and usages, both past and evolving, a healing approach was used to resolve tribal disputes. We are advised by our Elders that

[6] However, Appellant is not without remedy. Article IX of the Constitution provides that "[a]ny enacted or proposed ordinance or resolution of the board of directors shall be submitted to a popular referendum upon an affirmative vote of a majority of the board or when so requested by a petition presented to the board bearing the signatures of at least one hundred (100) eligible voters of the tribe. Such referendum must be held within sixty (60) days after receipt by the board of a valid petition. A vote of a majority of the eligible voters voting in such referendum shall be conclusive and binding upon the board of directors provided, however, that at least thirty (30) percent of those entitled to vote shall vote in such referendum conducted pursuant to tribal ordinance. On August 11, 1992, Chapter 12 of the Sault Tribe Code was enacted to facilitate the referendum process.

[7] Heidi Kiiwetinipinesiik Stark, Nenabozho's *Smart Berries: Rethinking Tribal Sovereignty and Accountability*, 2013 MICH. ST. L. REV. 339, 352 (2013).

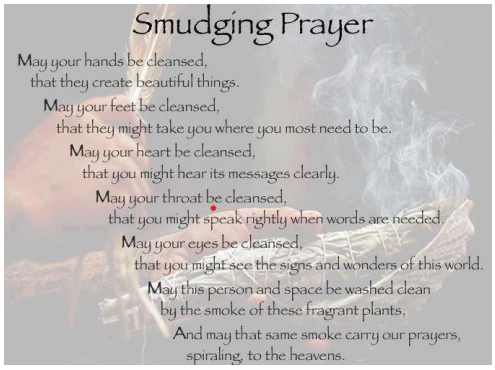
our Sault Tribe traditions encouraged participatory and consensual resolution of disputes, maximizing the opportunity for airing grievances (i.e. hearing), participation, and resolution in the interests of healing the participants and preventing friction within the tribal community. This Court is further advised that ceremonies provided context to *Anishinaabe-inaakonigewin* (Anishinaabe law) pursuant to the principle of *mno-bimaadiziwin*, as achieved through the implementation of the seven grandfather teachings, by infusing the governance process with life energy and spirit.[8] This principle is evident in the concept *zagaswe'idiwin* - defined by our *Anishinaabemoen* as council or a council meeting. Through ceremony, participants were establishing a reciprocal spiritual relationship, as this relationship transcended the physical realm and became recognized within the spiritual realm. Thus, the reason many tribal councils start their meetings with smudging, prayer and the drum. [9, 10] To that end, traditional practices advise that all governance decisions that were made during ceremony are considered sacred and binding.[11]

Here, it seems current elected tribal leadership made a decision they believed to be correct for the Tribe creating a new path for the future – one in which the tribal membership choose their chairperson without question. Just as our Anishinaabe teachings of *nibwaakaawin* (wisdom-use of good sense), *zaagi'idiwin* (practice absolute kindness), *minadendmowin*, (respect – act without harm) as well as *ayaangwaamizi* (careful and cautious consideration) must guide this Court's decision-making, this Court posits that these teachings guide all decision-making. When that happens, this Court must trust that the right decision will be made for the community as a whole. In accordance, with traditional practices of governance (described above), and the current structure of the Tribe's government, in this instance, the decision of the Board of Directors is final.[12]

As discussed previously, not even a claim of a Constitutional violation can overcome the Tribe's sovereign immunity. Despite Appellee's urging that this Court is free to apply western principles of jurisprudence and take jurisdiction for itself, this Court disagrees. The Appellee asserts that the reference to the Indian Civil Rights Act in the Tribe's Constitution waives the

---

[8] *Id.*

[9] 

[10] Giniwgiizhig Henry Flocken, *An Analysis Of Traditional Ojibwe Civil Chief Leadership* 31 (2013).

[11] Mervin Huntinghawk, *Since Time Immemorial: Treaty Land Entitlement In Manitoba, In Sacred Lands: Aboriginal World Views, Claims, And Conflicts* 40–41 (Jill Oakes, Rick Riewe, Kathi Kinew & Elaine Maloney eds., 1998); Robert A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions Of Law And Peace, 1600-1800* (1999); Colin G. Callo-Way, *New World For All: Indians, Europeans, And The Remaking Of Early America* (2d ed., 2013).

[12] It is noteworthy that Appellant is a named candidate on the December 7, 2022 Special Advisory Election Ballot. Had he been removed pursuant to Article VI, Section 3-5 of the Sault Tribe Constitution, Ch. 10, Section 10.110(j) would have prevented the Election Committee from certifying his candidacy and being placed on the ballot.

Tribe's sovereign immunity. That is simply not the state of the law. In fact, the legislative history of the Indian Civil Rights Act reflects an expectation of:

> a limited construction which takes an informed account of its development. It does not authorize the court to apply broadly such elusive and expanding concepts as due process, equal protection, or unreasonable search and seizure without a sensitive regard for their impact on tribal structures and values. [13]

As further pointed out by the Appellant, the United States Supreme Court has held:

> [T]he provisions of [25 U.S.C.] Section 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

(*Santa Clara Pueblo*, 436 U.S. at 59.).

ORDER

For the reasons specified above, the Tribal Court's November 4, 2022 Order Granting Defendant's Motion to Dismiss is AFFIRMED.

IT IS SO ORDERED.

Jump, Appellate Judge, concurring.

The cases that come before the Appellate Court vary widely and are of great importance to not only those requesting review of decisions handed down by the trial Court, but also to future litigants who come to settle their disputes before the Court. The outcomes may affect the rights of individual tribal citizens, such as child welfare or landlord tenant cases. Some cases involve the rights of all tribal citizens, as is the case we respond to today. Due to the importance of these cases, the opinions of the Appellate Court must be written in such a way using legalese that may be hard to understand or difficult to follow for those who do not possess a law degree. As an Appellate Judge appointed as a Community Member, I have an obligation to present our opinions in a manner that might be more easily understood.

To begin, tribal citizens have a responsibility to understand how our tribal government was formed and the documents that dictate how our government works. This includes being familiar with our Constitution, Tribal Codes and ordinances, our rights and responsibilities. Words matter. This is especially true when it comes to ordinances and laws, every word matters. When formulating an

[13] Donald L. Burnett, Jr. *An Historical Analysis of the 1968 Indian Civil Rights Act, HARVARD JOURNAL ON LEGISLATION, VOL. 9:557, p.* 618 (1971).

opinion regarding a legal issue, consideration must be given to each word in the law – as well as those that have been omitted.

The U.S. Constitution was ratified in 1788 and has been amended only rarely. In 234 years, it has been amended only 27 times. By comparison, the Constitution of the Sault Ste. Marie Tribe of Chippewa Indians (SSMTCI) was adopted on November 13, 1975. The Constitution has been amended only twice, once in 2007 to require that any person elected to the Board of Directors must divest themselves of any employment or contractual relationship with the Tribe and in 2010 removing the duties of the Chief Executive Officer from the Tribal Chairperson. Amendments to the Constitution of any government should be undertaken only rarely, and with great caution and concern for the rights of the people it protects.

Our ancestors went to great measures to protect our people, the citizens of the Sault Ste. Marie Tribe of Chippewa Indians. Such was their care for their people that they not only adopted the rights enshrined in the Indian Civil Rights Act, but they also went even further, adopting the rights guaranteed under the Constitution of the United States. See *ARTICLE VIII - BILL OF RIGHTS.* Among the many powers given to the governing board of directors is ***(g) To promulgate and enforce ordinances governing the conduct of persons within the jurisdiction of the tribe, to establish a reservation court and define its duties and powers,*** emphasis added**.**

In connection with this power, the Sault Ste. Marie Chippewa Tribal Court was established in 1977. Our Tribal Code is the collection of ordinances or laws organized by subject matter and adopted by the governing Board of Directors. It has more than 60 Chapters which define how specific matters will be treated by the Tribe itself. The Appellate Court was established with the adoption of *Chapter 82: Appeals*. Importantly, Chapters adopted both **provide for AND restrict** the jurisdiction and authority for enforcement of the subject matter.

Any duty to protect the interests of the people, not delegated to either the Trial Court, Appellate Court or others through the adoption of various codes and ordinances remains the purview of the governing Board of Directors. As such, the vast majority of the duty to protect the rights and interests of our people rests with the governing Board.

Importantly, our leaders envisioned that citizens of the Tribe might have reason to review or rescind the actions of the governing Board of Directors and provided a mechanism to do so. See *ARTICLE IX - RIGHT OF REFERENDUM.*

In 1992, the SSMTCI was sufficiently developed and sophisticated that the Board determined there was a need to waive sovereign immunity in order to engage in commercial transactions for the benefit of tribal citizens. See *Chapter 44: Waiver of Tribal Immunities and Jurisdiction in* ***Commercial Transactions****,* emphasis added.

It is important to note that the practice of Indian law, at both the federal and tribal levels is fairly young. For the SSMTCI, we've only been doing this for 50 years. Over the years our governing Boards of Directors have adopted various ordinances to provide for the protection of the Tribe itself

and of the interests of its citizens. Chapters of the tribal code have been amended as issues of importance have arisen. This is not unusual and should not, as a rule, be cause for alarm.

As is the norm with every case that comes before the Appellate Court, there are two competing sides that must be examined. Without resorting to the legalese above that is both required and can be difficult to follow, The Appellant, Mr. Hoffman argues that his appointment on June 27, 2022 as Tribal Chairperson by the previous Board of Directors was valid and in compliance with the Constitution and Chapter 10: Elections, specifically SubSection II: Special Advisory Elections. Therefore, the current Board of Directors improperly removed him on September 13, 2022. He asks to be reinstated as the properly appointed Tribal Chairperson.

The Appellee argues that there is more than one way to interpret SubSection II: Special Advisory Elections, and that the current board is "interpreting the Tribe's laws to mean that the members of the Tribe get to vote on who their Chairperson will be for the next two years".

The truth of the matter is that the issue before the Appellate Court has nothing to do with either of their arguments. The only issue before this Court is whether or not the trial court was correct in dismissing the petition for redress in the lower court based on sovereign immunity.

As noted above, the duty to protect the rights of our citizens rests primarily with the governing Board of Directors, due to the adoption of ordinances and codes which restrict the ability of others, including this Court, to do so. In particular, Chapter 44 dictates when and how the Board may waive sovereign immunity.

Chapter 44, written primarily to protect the Tribe's interest in commercial transactions, does not give the Tribal Court nor the Appellate Court the jurisdiction or authority to police the actions of the Board itself. Ponder that for a minute. If neither Court has the jurisdiction to hold the Board of Directors in check, who or what entity does?

Of course, there are remedies available. For instance, Chapter 12: Referendum Ordinance 12.102 Findings and Declarations gives citizens the right of referendum *on any tribal ordinance or resolution on submission by the Board of Directors or upon petition by eligible voters after adoption by the Board.* However, Chapter 12, Section 12.106(5) also requires that *the Board of Directors shall determine whether the petition is valid….*

The section cited above gives the Board of Directors the authority to determine any such item submitted for referendum to be valid or by extension, invalid. If that is the case, what is the recourse of the people? We've determined that the Board has not waived sovereign immunity in the case before us today. Is there any reason to believe that the Board would waive sovereign immunity in any case where the citizens are questioning their actions? Sadly, I find none.

This leaves the citizens of the Tribe with limited options to hold their government (our 12 elected board members) accountable for their actions. Tribal members have the right to file a referendum, but the Board has the power to simply determine the referendum to be invalid if it so

chooses. Of course, we have the right to vote in every election, but the next election is two years out. Consider the damage that can be done in the space of two years.

We've already seen actions to ignore a duly adopted ordinance which does not allow for a Special Advisory Election in cases where a duly noticed General Election has already been announced. That is the law that was in place at the time of appointment of Appellant Hoffman. Of course, that language has since been stripped from Chapter 10, followed a short time later by a resolution declaring the Chairperson seat vacant. What are the chances that a referendum of either of those resolutions would be determined "valid"? But timing is everything and it may have already run out for those resolutions in particular.

It is easy to dictate decisions that benefit the majority in the here and now. But the loyalties of politicians shift like the wind, in sometimes surprising ways. What happens to those whose loyalties shift - will they, too, be threatened with having their seat declared vacant?

It is difficult to accept that our ancestors, and all duly elected representatives since, intentionally chose to adopt ordinances that placed themselves out of the reach of the people they were elected to serve. No. Much more acceptable is the likelihood that our previous leaders, responsible to the people, took an oath to be honorable, and would never have manipulated our Constitution or Tribal Code in such a way that they and their colleagues could operate with impunity.

Our ancestors could not have known or foreseen that the threat to the rights of our citizens would come from within. After all, every person elected to the Board of Directors takes an oath to support the Constitution

Tribal Oath of Office
I do solemnly swear that I will support the Constitution of the Sault Ste. Marie Tribe of Chippewa Indians, and that I will faithfully discharge the duties of the office of Member of the Board of Directors of the Sault Ste. Marie Tribe of Chippewa Indians, according to the best of my ability. In discharging those duties, I will honor the seven teachings of our people; Wisdom, Love, Respect, Bravery, Honesty, Humility and Truth.

Pitch Nin Kitisminanbanig, Gayat Gaie, Kaginig Gaie, Spine Gaie Kagigekamig, Gaaiawigobanen, Anishinabewini-Dimadisiwinan, Nin Ga Manadenan.

(Continually as our Ancestors, we in the past, and are now and will continually be forever, I will honor the Anishnabe way of life.)

The power of the people has been lost to a Board that has chosen to dictate, not based on the rule of law, but on the wishes of the majority. While we may not be able to hold the feet of our leaders to the fire, the one power that citizens of this Tribe have that cannot be diminished is the right to vote for leaders that will not only uphold the Constitution but will not trample on the rights of the people.

With great sadness, I concur.

CERTIFICATE OF MAILING

I certify that on this date a copy of this Order was served on the attorneys of record by electronic mail.

Dated: 12.7.22

Traci L. Swan

Traci Swan, Court Administrator